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Supreme Court, U.S.
FILED
MAY 16 2005

No. 04-1230

IN THE

Supreme Court of the United States

WRIGHT ELECTRIC, INC.,
Petitioner,

v.

THOMAS A. OUELLETTE, INTERNATIONAL BROTHERHOOD ELECTRICAL WORKERS, LOCAL 292, AFL-CIO, AND MICHAEL J. PRIEM,
Respondents.

On Petition for Writ of Certiorari to the Minnesota Court of Appeals

BRIEF *AMICUS CURIAE* OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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May 16, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF THE *AMICUS CURIAE* [1]

This brief is submitted on behalf of the Associated Builders and Contractors, Inc. ("ABC"), a national trade association

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

representing more than 23,000 individual employers, both union and non-union, who perform work in the construction industry. ABC actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts, the United States Congress, the Executive Branch and independent agencies of the federal government. ABC has participated as *amicus curiae* in numerous National Labor Relations Board ("NLRB") and court proceedings, including cases in this Court. *See, e.g., BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Lechmere, Inc. v. NLRB*, 504 U.S. 527 (1992); *Town & Country Electric*, 309 NLRB 1250 (1992), *aff'd sub nom. NLRB v. Town & Country Electric Inc.*, 516 U.S. 85 (1995); and *FES, a Division of Thermo Power*, 331 NLRB 9 (2000), *supplemented*, 333 NLRB 66 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002).

Absent review and reversal of this case by the Court, ABC's member construction contractors and other employers will, as a result of the Minnesota state courts' misapplication of federal preemption under the National Labor Relations Act ("NLRA"), be denied a judicial remedy for violations of important state laws. Accordingly, ABC submits this brief *amicus curiae* to clarify the important distinctions between (1) the kind of union organizing activity commonly referred to as "salting" (where union agents who are "salts" seek employment on a non-union job site targeted for unionization), which is protected activity under the National Labor Relations Act; and (2) the unprotected "salting abuse" types of conduct present in this case. These distinctions are crucial to the analysis and determination of federal preemption under the NLRA, and were incorrectly applied by the state courts below, whose rulings are contrary not only to the determinations of the National Labor Relations Board in this case and in other like cases, but also to the seminal holding of this Court in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

ABC member contractors are frequently the targets of both union "salting," as well as "salting abuses" that violate state laws. Although the NLRB and the courts have defined simple "salting" as a legitimate organizing tool under the NLRA, "salting abuse" extends well beyond such protected organizing activity. It consists primarily of myriad unlawful tactics whose aim is the weakening or destruction of targeted non-union employers.

Clearly, one form of "salting abuse" that is not protected by the NLRA are the state law violations at issue in the present case, i.e., making false and fraudulent statements on employment applications unrelated to union status, such as concealing the identity of prior employers or past job transgressions relating to their lack of qualifications for the jobs they claim to be seeking. Such forms of resume fraud are a serious problem for employers and have an adverse impact on the ability of employers to hire qualified workers. Federal law, certainly, does not protect attempts by employee applicants to engage in such activities. This is all the more nefarious where, as here, job applicants are not asked to reveal their status as union supporters or organizers. Accordingly, absent enforcement of state law protections of the type invoked by Wright Electric in this case, ABC's member construction contractors, as well as other employers, will be left without an adequate legal remedy to deter such conduct and thereby protect their businesses from economic harm and potential legal liability.

There is an additional legitimate public policy interest in protecting the latter employers, their employees, and the public from the consequences of fraudulent and falsified employment applications such as occurred in this case. For ABC's members, such false statements or intentional omissions of prior training, work experience, or work misconduct, could jeopardize the company's ability to perform government construction contacts that require as a precondition an accurate

account of employee job training and experience, could also result in future employer liability and penalties for negligent hiring or retention, and could expose employees and the public to unsafe work practices. Thus, a construction employer could be held vicariously liable for violations of federal or state safety and health laws resulting from the unsafe working practices of the "salt," as well as being subject to legal actions brought by customers and fellow employees for injuries sustained as a result of such practices.

STATEMENT OF THE CASE

Petitioner Wright Electric is a non-union electrical contractor headquartered in Plymouth, Minnesota. As Petitioner asserts, when Thomas A. Ouellette ("Ouellette") applied for a position with the Company, he made a series of false statements and deliberate omissions on his employment application relating directly to his qualifications for the position he was seeking. Thus, Ouellette concealed that he had previously performed electrical work without a permit in violation of state law, that he had resigned without notice from a prior employer with whom he claimed on his application to still be employed, that he had intentionally broken company materials at another previous workplace, and that he had engaged in other workplace misconduct. Additionally, Ouellette's employment application concealed the identity of five previous employers.

When Wright Electric learned of Ouellette's application fraud, it acted consistently with the Company's established policies and terminated him. In response, International Brotherhood of Electrical Workers, Local 292, AFL-CIO ("Local 292") filed an unfair labor practice charge with the National Labor Relations Board alleging that Ouellette had been terminated because of union organizing activities in violation of the NLRA. The Board's General Counsel nevertheless refused to issue a complaint and dismissed the union's charge, concluding that there was insufficient evidence to

find that Wright had terminated Ouellette for anything other than falsifying his employment application.

Subsequently, Wright Electric brought suit in Minnesota district court against Ouellette, Local 292, and the Local's business agent, Michael Priem, based on common law claims arising from Respondents' fraudulent acts, and seeking monetary and injunctive relief. Local 292 then filed new unfair labor practice charges with the NLRB, contending that the filing of Wright Electric's lawsuit violated the NLRA. These new charges were addressed by both the Board and the Eighth Circuit Court of Appeals, both of whom effectively allowed Wright Electric's state court lawsuit to proceed, with no finding of NLRA preemption as to Wright's state court fraud claims. *See Wright Elec., Inc. v. NLRB*, 200 F.3d 1162 (8th Cir. 1999).

Ultimately, the Minnesota district court denied Local 292's motion for summary judgment with respect to Wright Electric's state law fraud and related claims, holding that such claims were not preempted by the NLRA. The Minnesota Court of Appeals then reversed the lower court. *Wright Electric, Inc. v. Ouellette*, 686 N.W.2d 313 (Minn. Ct. App. 2004), *review denied*, No. A03-1683, 2004 Minn. LEXIS 814 (Minn. Dec. 14, 2004). It held that Wright's lawsuit was preempted because Ouellette's misrepresentations were "arguably protected" under the NLRA. In so concluding, the Appeals Court misapplied this Court's rulings in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). Wright's petition for review to the Minnesota Supreme Court was subsequently denied. *Wright Electric, Inc. v. Ouellette*, 2004 Minn. LEXIS 814 (Minn. Dec. 14, 2004).

As we set forth below, the Minnesota Court of Appeals failed to give weight to this Court's controlling decisions that federal labor law preemption does not apply to state tort statutes of general application, particularly those laws that are

"deeply rooted in state common law and traditions." *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978); *Farmer v. Carpenters*, 430 U.S. 290 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). Instead, in what it acknowledged as an "anomaly," the Minnesota Appeals Court stated (686 N.W.2d at 325):

> As the law now stands, an applicant/salt may permissibly falsify his application and thereby hide negative, relevant aspects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities. In such cases, we believe a salt has met the minimal burden of demonstrating that falsifying an application by omitting any reference to the employer in question is "arguably protected" under the NLRA. *Until the NLRB or the United States Supreme Court addresses this anomaly, the law compels the result that we reach here today.* (Emphasis added.)

Amicus curiae, in support of the petition herein, joins the Minnesota court in inviting this Court to resolve that "anomaly" by granting review and reversing the state courts' rulings for the reasons that follow.

REASONS FOR ALLOWING THE WRIT

I. THE STATE COURTS MISAPPLIED THE LAW OF FEDERAL PREEMPTION UNDER THE NATIONAL LABOR RELATIONS ACT AND THEREBY PRIVILEGED THE MAKING OF FALSE STATEMENTS ON EMPLOYMENT APPLICATIONS.

As noted above, the Minnesota state courts' decision in this case rests upon a misstatement of federal labor law that "an applicant/salt may permissibly falsify his application and

thereby hide negative, relevant aspects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities." (686 N.W.2d at 325). Relying on an "arguably protected" analysis of federal preemption, the state courts ruled that the National Labor Relations Act, in effect, creates a "right to lie" about employment qualifications, and there-fore preempts state law to the contrary—an outcome that the court itself characterized as an "anomaly" calling for resolution by this Court. *(Id.)*

In fact, however, under the NLRA, there is no federally protected "right to lie" about employment qualifications, or to engage in common law fraud; and such fraud has never been privileged either by this Court or other federal courts, or by the National Labor Relations Board. We submit that the effect of the Minnesota courts' ruling is to immunize "salts" from legal proceedings arising from workplace abuses, thereby creating a preferred status of employment for salts elevated beyond that of ordinary employees. In fact, under that ruling, an employer could maintain a state court action for fraud against ordinary employees who falsify employment applications, but not against "salts." That result is not sanctioned by federal labor law.

Although this Court held in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995), that union agents seeking employment with non-union contractors fall within the definition of "employees" under the NLRA and cannot therefore be discriminated against based upon their support for unionization, nothing in that decision immunizes union "salts" from disciplinary action or other remedies for workplace misconduct. To the contrary, the Court explicitly declared that such misconduct would ***not*** be protected by the NLRA, and that union activists lose the protections of the NLRA when they step outside the boundaries of legitimate organizing activities

and engage in destructive or otherwise unlawful behavior violating settled workplace norms. 516 U.S. at 96. *See also Hartman Brothers Heating v. NLRB*, 280 F.3d 1110 (7th Cir. 2002) (NLRA protection limited only to "a lie related *solely* to one's union affiliation or unionizing intentions rather than to one's fitness for the job. . . ." and salt's conduct protected only if "the lie concerns merely his status as a salt, union organizer, or union supporter and not his qualifications for the job." 280 F.3d at 1112-13); *Winn-Dixie Stores, Inc.*, 236 NLRB No. 204 (1978) (omission of "union employment" was distinguishable from the omission or concealment of facts an employer is entitled to consider in its hiring decisions, in which case such falsifications are not protected by the NLRA); *Micrometl Corp.*, 333 NLRB 1133 (2001) (upholding discharge of union organizer for falsely identifying past employer on employment application).

In its decision immunizing "salts" from state common law liability for fraud, the Minnesota courts also rely on an overly expansive interpretation of *Garmon* preemption. For it is clear that under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), state law will be preempted only if it regulates conduct that is "clearly" or, under more limited circumstances, "arguably" protected by the National Labor Relations Act. Further, *Garmon* preemption is disfavored where the state law reflects "a substantial interest in regulation of the conduct at issue . . . and does not threaten undue interference with the federal regulatory scheme." *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (no preemption of state fraud claim).

As this Court stated in *Belknap*, *supra*, there is no *Garmon* preemption, and state law and state causes of action should be maintained, "if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility." 463 U.S. at 498. Accordingly, the "critical inquiry" in deciding

whether federal labor law preempts such deeply rooted state law claims is "whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the National Labor Relations Board." *Id.* The Court in *Belknap* emphasized (463 U.S. at 511):

> [The state] surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm. It is no less true here than it was in *Linn v. Plant Guard Workers, supra*, at 63, that "the injury" remedied by the state law "has no relevance to the Board's function" and that "the Board can award no damages, impose no penalty, or give any other relief to the plaintiffs in this case. The state interests involved in this case clearly outweigh any possible interference with the Board's function that may result from permitting the action for misrepresentation to proceed.

Of course, the NLRA provides no affirmative rights or remedies to employers for fraudulent conduct of union agents or members in falsifying employment applications. However, absent reversal by this Court, the state court decision in the present case will deny efforts by employers to seek redress under state law for unlawful union-sponsored misconduct. The Minnesota courts' ruling on preemption in this case likewise conflicts with the strong presumption, as repeatedly emphasized by this Court, that in certain matters "Congress did not intend to displace state law" *(Building Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island (Boston Harbor)*, 507 U.S. 218, 224 (1993)), and that courts should be "reluctant to infer preemption." *See also, Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987). This Court has further instructed that courts should be particularly reluctant to infer preemption when the state law at issue, as here, deals with

an area traditionally controlled by state law. *De Buono v. NYSAILA Medical and Clinical Servs. Fund*, 520 U.S. 806 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

It is, in fact, instructive that the Minnesota courts have demonstrated a substantial interest, and a deeply rooted state tradition, for protecting its citizens, such as Petitioner, who have been victimized by fraud. *See N.H. v. Caritas Family Services*, 488 N.W.2d 282, 289 (Minn. 1992); *Florenzano v. Olson*, 387 N.W.2d 168, n.4 (Minn. 1986); *Davis v. Re-Trac Manufacturing Corp.*, 149 N.W.2d 37 (Minn. 1967).

Accordingly, it is truly an "anomaly" for the Minnesota courts to immunize fraudulent conduct which, as we argue below, is harmful to its citizens. The anomaly is based on the state courts' misapplication of this Court's ruling in *Town & Country* and on an overly expansive "arguably protected" analysis of federal preemption under *Garmon*

In sum, the Minnesota courts' finding of labor law preemption in the present case directly conflicts with the decisions of this Court, as well as numerous other federal courts, and should therefore be reversed.

II. THE ISSUES PRESENTED BY THIS CASE ARE OF GREAT PUBLIC IMPORTANCE IN THAT EMPLOYERS WILL BE EFFECTIVELY LEFT DEFENSELESS AGAINST RESUME FRAUD AND ITS CONSEQUENCES IF THE MINNESOTA COURTS' RULINGS ARE ALLOWED TO STAND.

The particular type of salting abuse here at issue, lying on an employment application, is frequently characterized as "resume fraud"—a type of fraud that has reached epidemic proportions in the business world and is having a serious adverse impact on the ability of employers to hire qualified workers. Until the Minnesota courts' decision in the present

case, federal law has never been held to protect concealment by employee applicants of the identity of prior employers or past job transgressions relating to their qualifications; and this is certainly true where the applicants had not been asked to reveal their status as union supporters or organizers. Indeed, as noted earlier, federal law does not provide a remedy for falsification of employment applications or of resume fraud at all, leaving enforcement of such fraud claims to the states. Accordingly, in the absence of the enforcement of state law protections of the type invoked by Wright Electric in this case, employers will be unable to protect their businesses, their employees and customers from potentially serious harm.

Resume fraud has been recently described as a huge and growing problem that is "abundant"[2] and "rampant."[3] One recent report estimates that over 40 percent of all job application forms contain lies or discrepancies of some kind; and thirteen percent of people misrepresent negative aspects of their previous jobs relating to work habits, attendance, behavior, termination or other unfavorable conduct.[4] Another study, which likewise found that one third of all applicants commit resume fraud, determined that nearly half of such applicants had past performance problems or were not able to meet job expectations.[5]

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[2] "Many Resumes Are Misleading," SHRM Forum (2005), http://www.shrm.org/ema/library-published/nonIC/CMS_006087.asp; *see also* Pamela Babcock, "Spotting Lies," 48 HR Magazine No. 10 (Oct. 2003) (hiring lying applicants can be "an expensive mistake").

[3] Jane Ritter "The Lying Game: A Matter of Fact Approach to Resume Fraud," The Galt Global Review (Nov. 19, 2002), www.globalreview.com/careers/lying_game2.html.

[4] "Spotting Lies," *supra* n.2.

[5] "One-third Canadians Lied In Job Resumes Survey" Reuters (Jan. 19, 2000), www.infocheck.ca/news.html.

In order to protect their ability to hire qualified applicants, and whether or not the issue arises in the context of "salting" activity, employers must be able to investigate and take action against those who commit resume fraud. Indeed, employers are routinely advised by human resource experts that the only way to prevent such fraud is to thoroughly check all employment references on employment applications.[6] In this regard, the right of employers to take appropriate action against applicants or employees who commit resume fraud, once the fraud is discovered, has been repeatedly upheld in state courts across the country. *See, e.g., Sarvis v. Vermont State Colleges*, 772 A.2d 494 (Vt. 2001); *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P.2d 540, 549 (Colo. 1997).

Public policy should neither encourage nor reward deceitful conduct by applicants in the employment process, especially where, as here, an employer has a legitimate expectation to be truthfully informed by applicants about their qualifications for employment. Employers are exposed to vicarious liability for their employees' workplace misconduct, such as sexual and racial harassment, workplace violence, and occupational safety and health violations affecting co-workers and customers. Moreover, in an era of heightened security concerns and reference checks, it is ironic that the effect of the Minnesota courts' decision could be to encourage applicants to withhold their employment history and past transgressions with impunity, based solely on the assertion that by posing as "salts" they are immunized from common law consequences.

We submit that federal law should be clear that employers like Wright Electric are entitled to seek relief in state court from employee applicants' intentional fraud and unlawful misconduct. Indeed, other than the state courts, employers who are confronted with resume fraud have nowhere else to

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[6] *See* "Many Resumes Are Misleading," *supra* n.2.

turn for redress. For it is the state courts, not the federal courts, that traditionally address and remedy tortuous conduct. The Minnesota Court of Appeals correctly referred to its decision as an "anomaly;" indeed, that court's decision not only has the "anomalous" result of encouraging intentional fraud in the employment application process, but it also provides no acceptable justification for radically changing the normal balance of federalism.

CONCLUSION

The decision of the Minnesota Court of Appeals, and the denial of review of that decision by the Minnesota Supreme Court, directly conflict with rulings of this Court and with numerous other federal court decisions on issues of great public importance. For each of the reasons stated above, as well as those advanced by the Petitioner, the Court should grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

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